

EXHIBIT 10

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

IN RE: LIQUID ALUMINUM : Civil No. 16-md-2687-MCA
ANTITRUST LITIGATION

: TRANSCRIPT OF

-----x HEARING ON MOTION;

FAIRNESS HEARING

Martin Luther King Courthouse
50 Walnut Street
Newark, New Jersey 07102
September 26, 2019

BEFORE:

THE HON. MADELINE COX ARLEO, U.S.D.J.

Reported by:
CHARLES P. McGUIRE, C.C.R.
Official Court Reporter

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1 THE COURT CLERK: All rise.

2 THE COURT: Good afternoon, everyone.

3 all right. We're here in In Re Liquid Aluminum
4 Sulfate Antitrust Litigation.

5 Can I have appearances, please?

6 MR. CECCHI: May it please the Court.

7 James Cecchi on behalf of the direct purchaser
8 class. With me is my partner, Lindsay Taylor.

9 THE COURT: Okay. Hello, everyone.

10 MR. TAYLOR: Hello, Your Honor.

11 THE COURT: Okay.

12 MR. GREENBERG: Good afternoon, Your Honor.

13 Bruce Greenberg from Lite DePalma Greenberg, also
14 on behalf of the Direct Purchaser Plaintiffs Executive
15 Committee.

16 THE COURT: All right.

17 MR. MAIRO: Good afternoon, Your Honor.

18 John Mairo, Bill Hughes, Kelly Curtin from Porzio
19 Bromberg & Newman on behalf of Southern Ionics,
20 Incorporated.

21 THE COURT: Okay.

22 MR. RUBENSTEIN: Good afternoon, Your Honor.

23 Aaron Rubinstein and Paul Andrews from Arnold &
24 Porter Kaye Scholer on behalf of Defendant American
25 Securities.

1 THE COURT: Okay.

2 MR. RYAN: Good morning, Your Honor.

3 Bill Ryan, together with Aaron Casagrande on my
4 right. We represent Usalco LLC.

5 THE COURT: Okay. Thanks for coming in, everyone.
6 I know some of you have traveled a little bit of distance.
7 I appreciate your coming today.

8 And we have a couple parties on the phone.

9 MR. SHAPIRO: Your Honor, this is Jay Shapiro from
10 the Stearns Weaver firm. I'm here on behalf of the indirect
11 purchaser plaintiff class.

12 THE COURT: Okay.

13 All right, everyone, have a seat.

14 Okay. So, we're here to approve a settlement that
15 had been reached between the parties.

16 In that regard, I do have a brief from the direct
17 purchaser plaintiffs' motion for final approval of a
18 settlement with Southern Ionics, Usalco, and American
19 Securities, and for an award of counsel fees.

20 And I should note that I preliminarily approved
21 this settlement earlier this spring, and that, today, we're
22 here for final settlement.

23 The brief that I received states that there are no
24 objections to the settlement. Is that still the case?

25 MR. CECCHI: Judge, there is --

1 THE COURT: There's an intervenor.

2 MR. CECCHI: -- one proposed intervenor, and a
3 proposed objection, and counsel is here.

4 THE COURT: Okay. So let me hear from -- come on
5 forward. You can come up to the podium.

6 I should note for the record that I did get a
7 brief by Mr. McShane to intervene.

8 Are you representing Mr. McShane?

9 MS. RICKERT: I am.

10 Good afternoon, Your Honor. My name is Julia
11 Rickert, R-i-c-k-e-r-t.

12 THE COURT: Are you a member of the bar of
13 New Jersey?

14 MS. RICKERT: I have been admitted pro hac.

15 THE COURT: Okay.

16 MS. RICKERT: So, Your Honor, I'm here today to
17 argue this motion to intervene.

18 THE COURT: Well, I got your motion, and let me
19 just put it in some factual context.

20 So your client has qui tam cases pending in state
21 court.

22 MS. RICKERT: Yes, two in Illinois state court and
23 one in Virginia state court.

24 THE COURT: Right, and in those qui tam claims, he
25 is claiming fraud on behalf of some of the municipal parties

1 who were party to this action. Correct?

2 MS. RICKERT: Well, that's true of the Chicago
3 case, which is in the Illinois court. The other two cases,
4 to be precise, are brought on behalf of the Commonwealth of
5 Virginia for fraud against municipalities in Virginia, and
6 the other is brought on behalf of the state of Illinois for
7 fraud that was committed against the municipalities, but in
8 both of those cases, it is the state that will obtain any
9 recovery from the cases. The municipalities are not
10 guaranteed anything.

11 THE COURT: Okay. So you're new to this case, but
12 I have the ample record of Judge Linares, who has twice
13 addressed your motion to intervene, and I can read you from
14 an order that's found at the electronic docket at 1169,
15 dated December 3rd of 2018, almost a year ago, and he says
16 in paragraph five:

17 "The purpose of this order is to address
18 Mr. McShane's motion to intervene and object -- " -- and I
19 should state at this point there were other, ongoing
20 settlements; right? Some settlements had occurred before
21 this time and after this time, and there was some
22 preliminary approval going on.

23 MS. RICKERT: Yes, I believe that the order you're
24 talking about was from the Geo settlement.

25 THE COURT: Right. So it's a similar context, but

1 with different defendants.

2 And he says:

3 "The purpose of this order is to address solely
4 Mr. McShane's motion to intervene and object. Mr. McShane's
5 motion to intervene is denied because, as explained on the
6 record, Mr. McShane is not a member of either the direct
7 purchaser plaintiffs or the indirect purchaser plaintiffs,
8 and thus has no standing to intervene in this action for the
9 purposes of objecting to the settlement under Federal Rule
10 of Civil Procedure 24(a)."

11 MS. RICKERT: Yes.

12 THE COURT: And this was reiterated in a later
13 order of his, I'm not sure if it was a written order or at
14 oral argument. Neither of these orders were appealed or
15 attempted to be appealed to the 3rd Circuit.

16 The brief that I have from you today that was
17 filed on September 12th doesn't even address the standing
18 issue, which was the basis of both -- or more appropriately
19 address anything about the analysis of Judge Linares with
20 respect to standing in either of his prior two decisions.

21 MS. RICKERT: Your Honor, in the motion to
22 intervene, we did make an argument about why law of the case
23 should not apply here, because part of Judge Linares's
24 reasoning that there was no standing, yes, he said, not a
25 class member. Now, that is for standing under Rule 23. If

1 Mr. McShane was a class member, there would be no reason to
2 file a motion to intervene under Rule 24. Judge Linares
3 said based on representations from class counsel and defense
4 counsel that Mr. McShane's concern about the potential
5 release of his claims was speculative and supposition
6 because there had been no action taken in the state courts
7 to dismiss his claims, and for that reason, it would be an
8 advisory opinion, et cetera.

9 So our argument on the standing point is that we
10 qualify under Rule 24(a)(2) as of right, and that the
11 circumstances have changed since Judge Linares made his
12 ruling in that, now, the Defendants who have previously
13 settled, Geo, the Chemtrade Defendants, have actually filed
14 motions to dismiss based on the settlement in this case,
15 and so --

16 THE COURT: Judge Linares did not make a
17 conditional ruling. In fact, in paragraph six, he says:

18 "Mr. McShane's objection to the settlement is
19 denied. As the Court stated in the record of the hearing,
20 the Court is not making a ruling that the approval of this
21 settlement in any way affects Mr. McShane's qui tam action
22 pending in three separate courts."

23 He just said you have no standing to intervene
24 here. What happens in state court happens in state court.
25 There's nothing that I saw in his orders that his finding

1 was predicated on, if your motion is denied, you're invited
2 to come back and renew your motion here.

3 MS. RICKERT: Well, he did say during the hearing
4 that if this were to happen that the...

5 My apologies.

6 Judge Linares did ask repeatedly whether there had
7 been any motions filed and did say that it would be dealt
8 with at that time if such a motion were filed.

9 THE COURT: I don't see that in your brief, and I
10 certainly didn't see it in the record. So you said he said
11 something, and if you have a transcript in front of you, I
12 think it would be helpful to know precisely what was said at
13 the hearing. You didn't provide the Court with a copy of
14 that transcript.

15 MS. RICKERT: I apologize. I thought that we did
16 provide a copy of the transcript, but if we did not, I'm
17 sorry for that. If you can just give me one moment, I
18 will...

19 Okay. So in the transcript from April -- I'm
20 sorry, this is the second hearing -- the Court said -- this
21 is page 18, line 16 to 19 -- line 21, the Court said at the
22 end -- well, first, defense counsel said:

23 "I think, Your Honor, there's certainly been no
24 motions filed in the qui tam case and any speculation about
25 what will happen is just that, speculation."

1 And the Court said:

2 "Right. So if that were, in fact, to happen,
3 you're going to have to deal with it at that point, but at
4 this point, that is not before the Court."

5 So our understanding, at least --

6 THE COURT: Who said that?

7 MS. RICKERT: Judge Linares said that.

8 THE COURT: Read that again.

9 MS. RICKERT: "So if that were, in fact, to
10 happen, you're going to have to deal with it at that point,
11 but at this point, that is not before the Court."

12 THE COURT: I would really be stretching to read
13 that as an invitation by Judge Linares to -- that his
14 standing analysis would change based on just a filing. I
15 mean, I think it was anticipated that that filing would be
16 made, and there's been no ruling yet. And there's nothing
17 -- he wrote an order specifically addressing the motion to
18 intervene and said it's denied because he has no standing to
19 intervene in this action. That one line does not change the
20 written order in any way, shape, or form, and there's not
21 even in your brief an underlying analysis of how the
22 standing issue has changed.

23 MS. RICKERT: Well, we tried to clarify in the
24 brief in support of the motion to intervene that we are
25 moving under Rule 24, that we're not seeking to object as

1 class members under Rule 23. I think that Judge Linares's
2 order saying that there's no standing because Mr. McShane
3 isn't a class member, you know, may have misunderstood the
4 basis for our objection, which is under Rule 24. So we did
5 address that in the brief to clarify and explain the
6 criterion under 24(a)(2) and why we meet it.

7 So I think we did make that argument in our brief
8 in support of the motion to intervene, and to the extent
9 that Judge Linares's previous decision was based strictly on
10 Mr. McShane's status as a non-class member, you know, that
11 that's error because that is not the standard under Rule 24.
12 So I would ask you to reconsider that decision as a
13 misstatement of the law.

14 THE COURT: What did you move on before Judge
15 Linares in the motion to intervene?

16 MS. RICKERT: We did cite 24(a)(2) at that time,
17 but he did not address Rule 24 in his order.

18 THE COURT: So you moved under 24, he denied it,
19 and you didn't move for reconsideration; right?

20 MS. RICKERT: Correct.

21 THE COURT: And you didn't appeal it to the 3rd
22 Circuit.

23 MS. RICKERT: No, we did not.

24 THE COURT: And now you're asking me a year later
25 to reconsider his ruling.

1 MS. RICKERT: Well, this is a separate settlement,
2 so I'm not even sure that the --

3 THE COURT: But it's not the settlement; it's the
4 ruling. It's the same ruling.

5 MS. RICKERT: I understand that the circumstance
6 is very similar, it's a very similar settlement. As I said,
7 I think that circumstances, factual circumstances have
8 changed in that Mr. McShane's interest under Rule 24(a) (2)
9 is much more concrete now. It is, again, not as a class
10 member, but as a person who has an interest in claims that
11 are purported to be released by the settlement. And I'd be
12 happy to talk about the problems with that.

13 THE COURT: Well, let's talk about a couple of
14 things.

15 MS. RICKERT: Sure.

16 THE COURT: And then I'll let defense counsel
17 respond.

18 So, one of your clients or one of your qui tam
19 entities is the City of Chicago; correct? They're a party
20 in this lawsuit, and they have not objected to the
21 settlement.

22 MS. RICKERT: Correct.

23 THE COURT: All right.

24 MS. RICKERT: Or at least, that's my
25 understanding.

1 THE COURT: So what do you envision the
2 intervention -- what your role would be if I were to let you
3 intervene? With respect to Chicago.

4 MS. RICKERT: With respect to Chicago, so, you're
5 right that there are slightly different issues between the
6 Chicago case and the Illinois and Virginia cases. With the
7 City of Chicago, the -- you know, first of all, I would note
8 that the settlement language actually said that qui tam
9 claims were released to the extent of the power of the
10 signatory to release them.

11 Now, under the Chicago false claims ordinance,
12 like the Federal False Claims Act and all of the state
13 analogs, he who later brings the claim cannot have that
14 claim dismissed over his or settled over his objection
15 without a hearing on his objection and on the fairness of
16 releasing these claims and a judicial determination that
17 doing so is fair. So the city actually does not have the
18 power to, you know, passively settle these claims under that
19 statute, and if the city were reading the settlement
20 agreement and saw the release language and the discussion of
21 qui tams and saw that it said they're only released to the
22 extent of the powers of the signatories to the agreement,
23 they would know that the prerequisites for settlement had
24 not being fulfilled and would not understand the claims to
25 be released. They would have no reason to object or opt

1 out, necessarily.

2 When it comes to the state cases, the state
3 interests are not protected here at all. The class counsel
4 points out that, you know, the states have not -- have not
5 opted out, they have no ability to opt out, that they are
6 not class members, and their interest -- they have
7 intervened in the sense that Mr. McShane, who represents the
8 interests of those states in these actions, has intervened,
9 and he has a statutory right to pursue these actions and his
10 and the state's interests in them.

11 THE COURT: All right. Can I hear from
12 Mr. Cecchi?

13 MR. CECCHI: Yes, Your Honor.

14 So, just to put this in context, these are the
15 fourth, fifth, and sixth settlements of these antitrust
16 claims on behalf of the direct purchaser class.

17 In the first settlement, Mr. McShane filed -- the
18 Geo settlement, he filed essentially an identical motion,
19 and Judge Linares's ruling was that he was not going to
20 adjudicate the effect of the rulings. He was not going to
21 give an advisory opinion. What he did do and what he said,
22 and counsel was present when he said this, is, when the
23 motions are filed in the state court cases, you will deal
24 with it at that point in time.

25 So the argument that it was not contemplated or

1 that's a changed circumstance because now motions have been
2 filed is not accurate.

3 And I can cite Your Honor to Judge Linares's
4 language in the Geo settlement. What he said is, you will
5 have your transcript and you can quote it in your position
6 brief when it happens. When it happens, he was referring to
7 the motion to dismiss the qui tam case. The argument that
8 counsel just articulated about the inability to release the
9 claims, the state claims, she has every right and every
10 ability to articulate those arguments in the state court
11 case. Indeed, that was the basis of the ruling that Judge
12 Linares made: I am not going to adjudicate, I'm not going
13 to interfere with that qui tam judge; you go deal with it
14 there, because that's where it should be dealt with. It was
15 specifically contemplated motions to dismiss would be filed.

16 Fast forward to April of '19: Same motion, same
17 ruling. At that time, we made the argument. Judge
18 Linares -- it's law of the case at this point. They don't
19 have standing. He specifically ruled that they have no
20 right to intervene, and he held: Again, it's not for me;
21 it's for the state court Judge.

22 So all of this was contemplated. This is exactly
23 what was anticipated to happen, that the argument that
24 counsel articulates, whether they can be released or not,
25 that's what has been dealt with.

1 So now we're really at law of the case, and the
2 only argument that's articulated as to why we don't have law
3 of the case is because there's some changed circumstance is
4 factually not consistent with the record, because it was
5 anticipated that the motion would be filed in state court.

6 But there's a couple of very practical points that
7 I want to raise about the Rule 24 argument.

8 Rule 24 says you can intervene if you have some
9 right that's not being adequately protected by the people
10 here, by class counsel, and that gives you a right to
11 intervene.

12 The only argument Mr. McShane has ever articulated
13 as to why he has a right to intervene is his alleged
14 economic interest in the outcome of the qui tam cases. The
15 case law is clear. We briefed it to Judge Linares, we cited
16 it to Your Honor. That is not a reason to intervene under
17 Rule 24.

18 The second practical argument I want to raise is,
19 as counsel acknowledges, the City of Chicago is a class
20 member. I represent the City of Chicago. The City of
21 Chicago received direct-mail notice of this settlement, as
22 it did all of the other settlements. Presumably, if the
23 City of Chicago felt I was not an adequate representative of
24 its interests, it could have come before Your Honor. It
25 could have said something. If they wanted Mr. McShane to

1 represent them, opt them out, do anything, they could have
2 come forward. They're a class member.

3 As to the states, if they have a statutory right
4 to pursue these claims or if Mr. McShane has a statutory
5 right to pursue these claims, he has every ability to do so
6 in the state court and articulate his defenses to the motion
7 to dismiss.

8 So nothing has changed vis-a-vis Rule 24 or the
9 fact that Mr. McShane is not a class member. He's not a
10 purchaser of alum. So under whatever rule you want to look
11 at, he has no standing.

12 So we -- excuse me, Your Honor.

13 (Off the record discussion)

14 MR. CECCHI: Finally, Mr. Taylor has pointed out,
15 the final point is, these agreements before Your Honor are
16 agreements between the Defendants and class counsel and the
17 direct purchaser class. The law is, as much power as an
18 Article III judge has, the law is that you can't rewrite the
19 agreements for us.

20 So, the agreements are before Your Honor. Either
21 they're fair, reasonable, and adequate, or they're not.

22 So he's asking you to do something you can't do,
23 and I am always loath to say that to an Article III judge,
24 but that's just what the law is. We have voluntary
25 agreements. The release language is what it is. I can't

1 opine what the state judge is going to do. If counsel has
2 meritorious arguments, presumably, she will win; if she does
3 not, presumably, she will not.

4 So, nothing has changed. We think this is now law
5 of the case squared.

6 His motion should be denied.

7 THE COURT: Thank you.

8 Anything you want to add?

9 MS. RICKERT: Yes, if I may.

10 I would say, first of all, the idea that economic
11 interest isn't enough under Rule 24, that's not telling the
12 whole story.

13 So the cases that say this, like Mountaintop Condo
14 Association -- and, I'm sorry, I didn't have time to file a
15 reply to their brief, but it's 72 F.3d 361, a 3rd Circuit
16 case, talks about how -- yet the mere fact that a lawsuit
17 may impede a third party's ability to recover in a separate
18 suit isn't enough, but what it's talking about, it's very
19 explicit about this, is when someone is saying, those
20 defendants won't have any money left for my suit if this
21 settlement happens. Now, that isn't enough. But when you
22 actually have a claim that is purportedly being released,
23 that is a different situation.

24 And Mr. McShane doesn't just have an interest in a
25 recovery under the law. I mean, the Supreme Court has said

1 in Vermont Agency Natural Resources that -- this is the
2 Federal Fraud Claims Act, which is identical to the ones at
3 issue here -- "The statute gives the relator himself an
4 interest in the lawsuit and not merely the right to retain a
5 fee out of recovery." And the Court goes on to say for that
6 reason, you know, the government is prohibited from settling
7 the suit over relator's objection without a judicial
8 determination of fairness.

9 So there's no question about McShane's interest.
10 And the idea that the state's interests are protected here
11 in any way is false. The measure of damages in our case is
12 very, very different than the measure of damages in this
13 one. These are fraud claims. These are about actions taken
14 after the anticompetitive conspiracy was formed to defraud
15 the Government, and the fact is that the measure of damages
16 is not the difference between the fair market value and the
17 inflated price, it's -- there's fraudulent inducement here.
18 So we're talking about the full value of the contract.

19 Additionally, the government can -- fines are
20 available under these statutes for each false claim and each
21 invoice, and none of that is considered, I assume, by the
22 fairness analysis that you're conducting. And Rule 23
23 doesn't simply wipe, you know, wipe away the state laws and
24 make them ineffective. The states couldn't opt out, the
25 state's interests are not being protected here, and I think

1 it was, you know, a mistaken ruling before to exclude us on
2 standing grounds, and I would ask you to reconsider that and
3 consider the objection.

4 And if I may just add one more thing, there are
5 two possibilities. Either these are -- two cases. Either
6 class counsel said yes, we have the ability to release these
7 claims and would like to be paid for that and there is
8 consideration, or they haven't received consideration, in
9 which case this release would, you know, be a nullity.

10 I think it's well within your authority to figure
11 out what this settlement agreement means. I think that it
12 makes sense to find out whether they're purporting to
13 release what I believe are valuable claims brought by the
14 persons who blew the whistle on this entire scheme, the
15 Department of Justice, and, you know, they should be able to
16 articulate what exactly is happening here and what they're
17 releasing and under what authority. You know, they do not
18 have the authority to release, they have represented that
19 they do, that was incorrect, and defense counsel should be
20 aware of that.

21 THE COURT: All right. I just want to take a
22 quick look at something Judge Linares wrote. I want to take
23 a quick break, and I'll be back.

24 Mr. Cecchi, do you want to finish your point
25 before I take a break?

1 MR. CECCHI: Very quickly, Your Honor.

2 The claims that are being released here are the
3 claims that we asserted, the class claims. We didn't assert
4 qui tam claims. The arguments that counsel is articulating
5 presumably she has articulated to the judge in the state
6 court, and I'm not going to offer an advisory opinion, just
7 like Judge Linares didn't offer an advisory opinion.

8 MS. RICKERT: If I may, very briefly.

9 It's not an advisory opinion to determine whether
10 these claims are currently, right now, being released by
11 this settlement. These aren't hypothetical claims; these
12 are cases that exist, that are ongoing. I do expect to
13 prevail in the arguments in those cases.

14 But I would just point out that the Defendants get
15 an extra argument when you approve a settlement because then
16 they're arguing res judicata as well. Now, I don't think
17 that --

18 THE COURT: It's not res judicata because you're
19 not a party to this lawsuit.

20 MS. RICKERT: Well, yes, we have arguments against
21 that, but --

22 THE COURT: Well, it's not even close. I mean,
23 the issue is, the release does not address qui tam claims.
24 You're not a party to this lawsuit. Res judicata wouldn't
25 apply.

1 And I want to take a look at what Judge Linares
2 said, because, frankly, you said twice that Judge Linares
3 got it wrong, and what is this; there have been six
4 settlements? This has been raised three times, it's been
5 rejected three times on solid grounds and on a reasonable
6 basis on your motion to intervene, and there was never a
7 motion for reconsideration even filed, and there was
8 certainly never an appeal to the 3rd Circuit filed.

9 So after -- this is the sixth settlement?

10 MR. CECCHI: Fourth, fifth, and sixth.

11 THE COURT: Fourth, fifth, and sixth with the
12 three most recent parties. So, we had three before this,
13 Judge Linares made his rulings, and now a new judge comes
14 into the case, and there is no doubt in my mind that this
15 issue probably would not even have been raised, certainly
16 with the force that it's raised now, if Judge Linares was
17 here.

18 MS. RICKERT: I disagree. I --

19 THE COURT: Well, I can assure you of something:
20 If Judge Linares was here, it would be summarily denied,
21 because he's been so clear about it.

22 And I just want to look at his precise language,
23 because the language you pointed out that suggested that
24 Judge Linares was inviting a motion, another intervention
25 motion, a later intervention motion, if the motion was

1 filed, it seems ambiguous to me, number one, and, number
2 two, it wouldn't make sense anyway, because, if these
3 settlements had occurred, you know, the next day, a year ago
4 instead of today, they would be done, there would be a final
5 judgment, and you wouldn't be able to even make the argument
6 because the motions were subsequently filed.

7 So it seems that when you said the changed
8 circumstances are the filing of motions, it doesn't seem to
9 be a changed circumstance because that was clearly something
10 that could have been anticipated by, was anticipated by the
11 parties years ago, and it didn't change his ruling. His
12 ruling was, as Mr. Cecchi pointed out, you can raise it
13 there in state court.

14 MR. CECCHI: Judge, I have the transcripts if that
15 would assist Your Honor.

16 THE COURT: Yes, I'm going to take a look at them.

17 MR. CECCHI: And I can point you to, Your Honor,
18 the Geo settlement, it's 38:11 to 39:23. That's the
19 transcript of November 14th, 2018, where the Court says, you
20 know, when the issue is raised in the state court case,
21 raise these issues there to the state court judge. I mean,
22 that's the context.

23 THE COURT: And remind me what the release
24 language says in this case.

25 MR. CECCHI: The release is a broad release. It

1 does say qui tam claims. The arguments are, however, that
2 we don't have the ability to release qui tam claims, and
3 that argument was articulated once, twice, three times. The
4 first two times, Judge Linares said, I'm not opining on
5 that; go to the state court, because, if they can't release
6 it, you have a qui tam case pending. If I can't release the
7 state qui tam claims, well, presumably, that's what the
8 judge will rule.

9 And Mr. Newell, who is counsel's partner, agreed
10 with that analysis. What he said is -- the Court asked --
11 what the Court says is:

12 "This is not to indicate what, if anything, should
13 be the decision on the qui tam actions at the state court."

14 "Mr. Muchnick," counsel for Geo: "I agree."

15 "Mr. Cecchi: We're in agreement as well."

16 "All right, Mr. Newell," says the Court.

17 "Mr. Newell: Yes, I think that is fine, Your
18 Honor."

19 THE COURT: Let me ask you one more question.
20 Hypothetically, if you were to intervene, your purpose in
21 intervening would be to say, we're a party now or an
22 intervenor, and we object to the language in the release.
23 That's your point.

24 MS. RICKERT: No, we don't actually object to the
25 language --

1 THE COURT: I'm just trying to understand what you
2 would envision your role is if I were to grant your motion.

3 MS. RICKERT: Sure.

4 All we would really want is an order recognizing
5 that the release language, which is limited to the power of
6 the signatories to the agreement to release qui tam claims,
7 that these signatories do not have that power, and
8 therefore, the claims are not released.

9 THE COURT: So you want in this case -- that's all
10 you want to do. You want to make sure there's clear
11 language that says qui tam isn't released; right? And what
12 if -- even though you really don't have any direct interest
13 in the settlement here, right --

14 MS. RICKERT: Well --

15 THE COURT: I know you have a general interest
16 because money is fungible, but you don't have a direct claim
17 here. If they agreed to that language today, and we put the
18 settlement through, you don't obtain anything as a result of
19 the settlement.

20 And if Defendants say, we're not agreeing to that
21 language, then we have to go forward with the trial because
22 you don't agree?

23 I mean, I don't even understand how it would go
24 forward.

25 MS. RICKERT: Well --

1 THE COURT: In other words, because, what if they
2 say, we're absolutely not agreeing to that language; we've
3 negotiated this, and we want a broad release, the language
4 is the language, and we're not settling. So then what
5 happens?

6 MS. RICKERT: Well, the language is the language,
7 and as I said, it does actually carve out --

8 THE COURT: Well, listen to my point.

9 MS. RICKERT: Sure.

10 THE COURT: I let you in; and Defendants say,
11 we're not agreeing to that language, we want the same
12 language that we have right now.

13 What happens?

14 MS. RICKERT: Well, then, I would say, yes, this
15 language is fine in your order approving the settlement. I
16 would ask that you include that --

17 THE COURT: What if they object to it and say no?
18 So, in other words, what you're really asking for,
19 ultimately -- you don't have an interest in the outcome of
20 this case. What you have an interest in is having the Court
21 tell a state court judge how to interpret release language,
22 that no matter what the parties agreed to or don't agree to,
23 I'm going to tell them in the order approving the settlement
24 that it carves out the qui tam action for them. That's
25 really what you want, because, if they don't agree, you're

1 saying, well, Judge, they don't have to agree, the
2 Defendants, you can just basically rewrite the release
3 language in your order approving the settlement, or make a
4 carve-out.

5 MS. RICKERT: Right, there is a carve-out. It's
6 the release language which they don't, you know, quote as
7 language in their brief, but the release language actually
8 says that qui tam claims are being released to the extent of
9 the power of the signatories to the agreements. And what I
10 would want to be just an acknowledgment that they have not
11 shown that they have the authority to --

12 THE COURT: So, in other words -- but that's my
13 point: You want me to clarify language for really a third
14 party who has no interest in this litigation, to clarify it
15 so when you have your motion in state court: Judge Arleo
16 has said that that's what the carve-out means, so that your
17 motion is stronger. That's really what it is.

18 But what I'm saying is, that's really not the
19 purpose of intervention, and that's why Judge Linares --
20 you're not a party to this lawsuit. You're coming in in an
21 unrelated lawsuit, saying, there is a carve-out for you, but
22 I want to make it crystal clear that that carve-out means
23 that I can go forward in my state court action.

24 MS. RICKERT: Well, I think that you are the
25 appropriate judge to say what the settlement is doing and

1 what exactly is being exchanged between these parties, so I
2 think it would be -- I don't think it would be inappropriate
3 to inquire about what claims are actually being released.

4 THE COURT: But here's what my job is: To make
5 sure that this settlement between these parties is fair and
6 reasonable under all the circumstances. It's not for me to
7 opine and offer judicial guidance or an advisory opinion as
8 to whether other cases that are offshoots should go forward
9 in other jurisdictions. I'm looking at the two parties, and
10 if they negotiate a settlement -- I didn't negotiate the
11 settlement, they did, with the help of Judge Hochberg and a
12 mediator, and it was at arm's length, and no one's disputing
13 all of that. There are no other objectors in the room but
14 you.

15 Is there one other objector?

16 MR. CECCHI: No.

17 THE COURT: No other objectors.

18 And so what I do is, I look at it holistically and
19 say, as my role as District Court: Is this fair and
20 reasonable under the circumstances? Does it protect the
21 interests of the parties? Is it negotiated at arm's length?
22 Does it satisfy the Girsh factors? That's what I have to
23 do. And that doesn't mean I look to say, nor would I:
24 Well, the carve-out language has to be clearer so that
25 another judge looking at this in another jurisdiction can be

1 clear that it doesn't carve out that case. That's what I'm
2 struggling with. And I think that's what Judge Linares said
3 when he said in his order that Mr. McShane's motion is
4 denied because he is not a member of either the direct
5 purchaser plaintiffs or the indirect purchaser plaintiffs
6 and has no standing to intervene in this action for the
7 purpose of objecting to the settlement under Federal Rule of
8 Civil Procedure 24(a). That's exactly what he said.

9 MS. RICKERT: Yes. During the hearing, he did
10 repeatedly ask them if they were actually purporting to
11 release qui tam claims, and how and why, and whether any had
12 been filed. He was actually concerned about that. I agree
13 that that didn't make it into his order.

14 We're in a little bit of a tough spot because
15 there is no question that they are attempting to release the
16 claims that these clients and governments controlled.

17 THE COURT: Well, let me stop you for a minute.

18 You know, when you settle a lawsuit between
19 parties, right, Defendants always want a broad release, and
20 Plaintiff will agree to a general release, which is,
21 everything up to this point.

22 And this release actually -- and a general release
23 is, everything is gone, known or unknown up to this point.
24 That's a general release; right?

25 They made a carve-out, and it was a careful

1 carve-out, and the carve-out carves out in qui tam --

2 What's the language of the carve-out?

3 MR. CECCHI: To the extent we have the ability to,
4 and as Your Honor articulated, it's exactly what
5 Judge Linares said the first time, that all I'm doing is
6 opining on the fairness of the settlement, I'm not making
7 any other ruling of the effect of this release for the state
8 court judge. It's exactly what he said.

9 THE COURT: And the carve-out says?

10 MR. CECCHI: The qui tam claims are released as
11 counsel articulated to the extent we have the ability to do
12 so.

13 And that's my point about counsel's argument. If
14 she's right, if counsel is right, then she wins in the state
15 court. That's where the argument should be articulated, not
16 here, because the settlement here says what it says. We
17 negotiated it. And as Your Honor pointed out, this was at
18 arm's length. None of these settlements would have gone
19 forward without a broad general release. That's just the
20 reality of how this works.

21 THE COURT: Anything else you want to add?

22 MS. RICKERT: Yes. I want to just add that, you
23 know, either they are -- the claims are actually in jeopardy
24 based on this release language, in which case, and I think
25 they would later have an interest in the right to intervene,

1 or they aren't, and if the relator has no interest in this
2 proceeding, it's because his claims cannot be affected by
3 this release. So I would -- and in our motion, we ask in
4 the alternative that if you're going to deny the motion to
5 intervene that you do so on the basis that a later
6 intervenor, relator in these other cases, that his interests
7 are not at issue here because the settlement cannot affect
8 his cases. I think that would be the only basis for finding
9 that he has no right to intervene.

10 And I would also want to add, and I think Judge
11 Linares understood this when my colleague was at the last
12 hearing, that it's important for us to not have the State
13 Courts get the wrong impression and believe that this Court
14 is deciding that our claims are released. So he understood
15 that in the second hearing. He said, you know, preserve
16 whatever you need to preserve, and I will refer back to last
17 time, even though he denied the motion to intervene the
18 first time, he was very careful to say, nothing that I do
19 here is meant to affect the claims of Mr. McShane.

20 And so our coming in again today is because we
21 need to continue to protect to Mr. McShane's rights,
22 particularly in light of the actual motions that have been
23 filed to try to dismiss his claims based on settlement in --
24 from this Court.

25 So we would ask that if you deny the motion to

1 intervene that you do include language about the lack of
2 effect on Mr. McShane's cases.

3 THE COURT: Anything to add?

4 MR. CECCHI: I mean, that's what Judge Linares
5 said on the record, and counsel said, the effect of the
6 release is for the state court judge, and we agreed to that,
7 and Mr. Newell agreed to that the first time around, and the
8 second time around. And Judge Linares didn't offer an
9 advisory opinion to the state court about the effect of the
10 release on those qui tam claims. The release says what it
11 says. It will be for that judge to decide whether those
12 claims, Mr. McShane's purported claims are released.

13 So that's what happened, and we agree.

14 THE COURT: All right. I just want to look at
15 something that Judge Linares said, and I'll be back in five
16 minutes.

17 MR. SHAPIRO: Your Honor, before you leave, I have
18 this issue, if I could raise for one second?

19 THE COURT: Sure.

20 MR. SHAPIRO: It's Jay Shapiro.

21 Apparently, counsel for the Delta Defendants was
22 also supposed to be part of this call, but for some reason,
23 when I was patched in, they did not make it onto the call.

24 THE COURT: Well, they did, but they hung up. So
25 if they want to call back in, they're more than welcome to.

1 If not, they can get a copy of the transcript.

2 MS. RICKERT: Actually, I got a message that your
3 staff asked me to patch them in. So I was going to do that.
4 I just wanted to let you know.

5 THE COURT: Well, let me stop you.

6 You can patch them in.

7 They chose not to come in to court. When a lawyer
8 chooses to participate by phone, they do it at their own
9 risk. We have limited capability here, and if calls get
10 dropped, I'm not going to stop the hearing, and that's the
11 risk you run when you participate by phone.

12 I would ask you to extend them the courtesy of
13 patching them in, and wait patiently, and they can
14 participate and be heard if they have anything to offer when
15 we resume.

16 Thank you.

17 MR. SHAPIRO: I will do that, Your Honor. I'm
18 just trying to be helpful.

19 (Recess taken)

20 THE COURT CLERK: All rise.

21 THE COURT: Have a seat, everyone.

22 I understand we have found the lost lawyer.

23 MS. KEILTY: We have, Your Honor. I apologize for
24 the inconvenience.

25 This is Kayleigh Keilty from Saul Ewing Arnstein &

1 Lehr on behalf of Delta Chemical, John Besson, and Rebecca
2 Besson.

3 I appreciate the Court's patience.

4 THE COURT: No worries. We don't have conference
5 capability, so it's best to have one lawyer call the other
6 lawyer and we can all have it that way. Once you
7 disconnect, we don't have a way to reconnect you. That was
8 the problem.

9 But anyway, if you need to be heard before I make
10 my ruling, you certainly have that opportunity.

11 All right. So where we left off was a request by
12 Mr. McShane's lawyer that, if I don't grant the motion to
13 intervene, to make some kind of language about the effect of
14 the release in this matter as it relates to the qui tam
15 matter.

16 and I'm struck by the fact that that identical
17 argument was made before Judge Linares not that long ago, in
18 November of '18, when we had one of the first settlements.

19 And this issue was addressed at length. This was
20 not a collateral issue. It was addressed at length, it was
21 argued at length, including by counsel for Mr. McShane, and
22 the same exact issues that are raised here were raised then,
23 and there was fulsome discussion about this precise issue
24 happening, which would be how this release would affect the
25 ability of the qui tam actions to go forward in the

1 respective jurisdictions. They may not have addressed, used
2 the words "motion to dismiss," but certainly that was the
3 whole point of McShane's counsel making the arguments then a
4 year ago, which are the same arguments that are made now.

5 And a couple of things that Mr. Cecchi pointed
6 out, but I read a little bit further for context, and this
7 is the language we just talked about for the last 20
8 minutes. This is exactly what Judge Linares said at page
9 38, line -- I'll go back with the question:

10 "Well, people make claims all the time. That is
11 something else in some other court might affect me, but you
12 have the ability to make the argument, has to be real
13 controversy just by virtue of him saying it might happen.

14 "The Court: Let me tell you this. I am not
15 taking a position and this Court is not making a ruling
16 today, and anything that I do with regard to this judgment
17 today releases or terminates the qui tam action or affects
18 them in any way, then it is up to the other courts to decide
19 that issue. I am not taking a position and this Court is
20 not making a ruling today that anything that I do with
21 regard to this judgment today releases or terminates the
22 qui tam action or affects them in any way."

23 That is the same language that counsel just asked
24 for, and that's exactly what Judge Linares had previously
25 said a year ago: Nothing I do will affect them in any way.

1 MR. CECCHI: Right.

2 THE COURT: That's his language.

3 MR. CECCHI: Right, and, Judge, we would agree
4 that the same situation appertains today just as it at
5 appertained then.

6 THE COURT: It would be extraordinary for me --
7 let me just start with a little bit of the analysis.

8 So that's what Judge Linares says, and he goes on,
9 and there was even some agreement by counsel on that point.

10 And then, Mr. Newell was counsel; correct?

11 MR. CECCHI: Yes, Judge.

12 THE COURT: This is what Judge Linares says:

13 "I can only decide what is in front of me, and
14 what is in front of me is the fairness of the settlement and
15 the appropriateness of the settlement. Whether or not there
16 is a decision by another court what the effect of this is,
17 it's going to be up to them, except it is going to be clear
18 from this record I am speaking that all I am doing is
19 settling the claims that are before me.

20 "Correct.

21 "Are we in agreement, Your Honor," Mr. Cecchi
22 asks.

23 "The Court: All right, Mr. Newell?

24 "Mr. Newell: Yeah, I think that is fine, Your
25 Honor. I think, you know --

1 "The Court: You will have the transcript, and you
2 can quote it in your position brief when it happens. I
3 think that what I said on the record, because I have
4 authority to say that, but beyond that, I think most of what
5 you are trying to get me to do was really -- was, A, you
6 were straining into areas where you had no standing and
7 asking me to get involved in claims that are not before the
8 Court. But I think based on the statements I just made on
9 the record, I think that gives you at least a comfort that
10 you need in regard to the actions that are not pending
11 before the Court.

12 "Mr. Newell: Yes, Your Honor.

13 "The Court: The issue is not whether or not there
14 should be a final approval of the settlement. You sent a
15 letter to the Court last night, counsel, advising me you may
16 want to pursue this. I don't even know if the other
17 attorneys have even had a chance to see it, but I'll deal
18 with that when you make the particular motion pertaining to
19 that. As far as objections, it is the same objection you
20 raised before, you have done -- done by raising the
21 objection here, but the same ruling that I made last time
22 otherwise applies to here."

23 So I begin by saying that this is not a changed
24 circumstance. This is not an extraordinary interest of
25 justice, new fact or evidence that would require a different

1 analysis from what Judge Linares has addressed twice in two
2 settlements that have already been approved by this Court
3 that were litigated by Mr. McShane's counsel, and to some
4 extent, he agreed with the language and the ruling that
5 Judge Linares had made at that time, certainly in November
6 of 2018.

7 And, while the Court has discretion in revisiting
8 issues that were resolved earlier in a litigation, there
9 really has to be some kind of extraordinary or at least some
10 kind of compelling circumstances, whether there is new
11 evidence available, a superseding law has been announced, or
12 the earlier decision was erroneous or would create manifest
13 injustice, and I am simply not satisfied that that standard
14 is met.

15 There was an opportunity to more fulsomely have
16 this reconsidered in a motion for reconsideration. It was
17 not done. There was no appeal to the 3rd Circuit. And, in
18 fact, it appears that counsel agreed to the language that
19 Judge Linares stated on the record at the time that he made
20 his ruling.

21 So, I'm satisfied that there's no basis to change
22 the ruling of Judge Linares, and on that basis alone, I'm
23 going to deny the motion, with the following thought that
24 was certainly evident in Judge Linares's ruling, which is
25 that this comes before me as a motion to approve a

1 settlement between the parties. The parties are the
2 Plaintiffs and the Defendants here. My job is to make sure
3 that it is fair and reasonable under all the circumstances
4 and that the fee award is appropriate, not to relitigate and
5 not to carve out and change negotiated language between the
6 two parties. That was part of Judge Linares's ruling, and
7 I'm satisfied that that is sound reasoning here today.

8 I am also not convinced, nor was Judge Linares,
9 that Mr. McShane is a proper party to intervene. He seeks
10 intervention, but I'm not convinced that he has sufficient
11 interest in this action that is not adequately represented
12 by the existing parties to the action. Mr. McShane is
13 asserting qui tam actions in other courts, and those
14 qui tams belong to the government entities on whom they are
15 being asserted. He seeks to intervene in order to object to
16 the settlement, but I'm not convinced he has standing to do
17 so since he is not a class member and during the class
18 period, and that is yet another reason to find that he does
19 not have standing.

20 And to the extent that the municipalities'
21 interests are being affected here, they have notice of this
22 settlement, and they have not in any way objected to the
23 settlement before the Court.

24 So, for all those reasons, I am denying again the
25 motion to intervene, and for the reasons that were expressed

1 on the record and for the reasons expressed by Judge
2 Linares, I'm satisfied that there is no reason to come to a
3 different conclusion than he did twice, and the motions,
4 therefore, to intervene and object are both denied.

5 In terms of the alternate relief that's sought to
6 make some kind of statement about the effect, I will refer
7 any judge looking at this to look at the careful and
8 considered words of Judge Linares in his November 14th, 2018
9 transcript. I'll rely on that.

10 All right. Let's get to the motion to approve.

11 Mr. Cecchi, do you want to give me just a brief
12 overview of the proposed settlement?

13 MR. CECCHI: Yes, Your Honor.

14 These, as we discussed, are the fourth, fifth, and
15 sixth settlements in this antitrust MDL. They are all cash
16 deals, and all of these agreements and settlements are
17 fundamentally, as best we could, within the penumbra of
18 trying to get it as close to market share as we could, given
19 all of the other settlements, and given our analysis of the
20 market, the size of the sales of each of these Defendants,
21 and their relative culpabilities, we think all of the
22 settlements are appropriate, and fair, reasonable, and
23 adequate.

24 As Your Honor indicated, this litigation has been
25 long, it's been hard fought. Millions of pages of documents

1 have been exchanged. The settlements were negotiated under
2 the auspices of two experienced mediators, Judge Hochberg,
3 who Your Honor knows, and David Geronemus, who is an
4 experienced mediator with JAMS and clerked for Justice
5 Stewart.

6 So, given the fact that there are no objections to
7 the substance of the settlement, to the fairness of the
8 settlement, I would rely on our final papers and the fact
9 that, again, they're all essentially proportional to each
10 other based upon market share.

11 In terms of our application for fees and expenses,
12 we've set forth our arguments in the brief. This has been a
13 long litigation. There have been many lawyers involved. If
14 the fee request is granted, when everything is aggregated,
15 we're still in a slightly negative multiplier position, and
16 again, no one has objected to our latest fee request, and I
17 am hopeful that Your Honor would grant it, and for that
18 reason, I have prepared a proposed form of order.

19 But other than that, if Your Honor has any
20 questions about the settlements, I'm prepared to answer
21 them, but I think that they stand on their own merits.

22 THE COURT: Would anyone else like to be heard?

23 (No response)

24 THE COURT: All right. Like the similar
25 settlements before me, I am prepared to approve this

1 settlement as being fair, reasonable, and adequate under the
2 circumstances.

3 The 3rd Circuit directs us to look at the factors
4 that are formally considered under the Girsh case, and here,
5 all those factors militate in favor of approving the
6 settlement.

7 The proposed settlement was negotiated at arm's
8 length with the capable help of Judge Hochberg, and the case
9 has been ongoing for many years now. I understand that
10 there were her efforts, the efforts of the JAMS mediator,
11 and that factor militates, again, in favor of approving the
12 settlement.

13 I'm satisfied that the methodology that the
14 parties have agreed to for distributing relief to the class,
15 including the methodology for processing their claims, are
16 also fair and reasonable, given the risks and the further
17 delay that would inevitably result if the case went forward.

18 So, I am satisfied that this is a settlement that
19 is made in good faith by strong counsel to a long and
20 hard-fought case that is finally coming to an end, at least
21 partially with respect to the overall claims in this larger
22 case, and that I'm prepared to approve it.

23 I'm also inclined to and will approve the counsel
24 fee award requested by counsel. The fee is in an amount of
25 33 percent of the settlement proceeds made available to the

1 direct purchaser settlement class, and expenses and
2 contribution awards in the amount of \$10,000 to the named
3 class representatives.

4 There are a couple of points to note here: That
5 the result achieved, certainly one of the factors to be
6 considered in assessing the strength of the attorneys' fee
7 award, the common class fund here is over \$25 million, and
8 that factor militates in favor of approval.

9 There are no objectors at all to the amount that
10 is sought.

11 It's without question that this was a complex and
12 long-fought litigation involving complex antitrust issues,
13 certainly probably the top of the food chain in terms of
14 difficulty and complexity of class actions, certainly class
15 actions or multidistrict litigations. That factor certainly
16 militates in favor of settlement.

17 There was certainly a risk of nonpayment here,
18 given all the legal issues, and much time devoted by
19 Plaintiffs' counsel, and, finally, this award is similar to
20 awards approved in similar cases.

21 So, for those reasons, I am going to approve the
22 settlement, and I'm also going to approve the fees, the
23 out-of-pocket expenses, and the contribution awards to the
24 parties.

25 I do not have a proposed form of order. Do you

1 have one?

2 MR. CECCHI: May I approach, Judge?

3 THE COURT: Sure.

4 All right. Let me take a minute and look at this.

5 Is there anything further?

6 I'll take a quick look at the order off the
7 record, and then I will give you a copy, and then I will
8 electronically file it today.

9 MR. CECCHI: Judge, there's just one housekeeping
10 item.

11 In our exuberance responding to the motion to
12 intervene and object, we did indicate that we felt that
13 perhaps there was an arguable Rule 11 issue here. We
14 formally withdraw that on the record. We have no intention
15 of proceeding. We fully understand after hearing argument,
16 hearing Your Honor's ruling why counsel in good faith
17 presented the arguments that she did, so we will not be
18 pursuing that, and we withdraw it.

19 THE COURT: Thank you, and I will terminate that
20 motion. Okay?

21 MS. RICKERT: Your Honor, if I may, just quickly,
22 if there is a subsequent settlement that has the same
23 language that similarly could affect Mr. McShane, is there a
24 way for us to ask you to say, once again, that your ruling
25 is in no way intended to opine on the effects of that

1 release --

2 THE COURT: I can say that to the extent that this
3 issue is raised again that my ruling -- I don't want to give
4 an advance ruling, but you're certainly free to send in a
5 letter. And I don't think I should be making advance
6 rulings. I mean, what I said about referring to
7 Judge Linares's reasoning applies certainly to this case,
8 but there could be changed circumstances. I'm not going to
9 say everything automatically applies for the rest of the
10 case. You can certainly put in a letter. You don't have to
11 appear; you can appear by phone. I can just reference
12 today's hearing so the issue is preserved for you.

13 MR. CECCHI: Judge, we're happy to meet and
14 confer. There is only one more settlement from direct
15 purchaser class. We're happy to meet and confer and make it
16 as soon as possible.

17 THE COURT: Yes, you don't have to come back
18 again. Where did you travel from?

19 MS. RICKERT: Chicago.

20 THE COURT: Okay. Well, I hope you had a nice day
21 in New Jersey.

22 (Laughter)

23 THE COURT: And so you don't have to come back
24 again, unless you want to, you know. You can certainly
25 participate by phone or send me a letter, and I'm happy to

1 put you on the phone and say your arguments are preserved.

2 MS. RICKERT: Okay.

3 THE COURT: All right? Thank you.

4 All right. Let me take a minute with this order
5 and I will be right back.

6 MR. CECCHI: Thank you, Your Honor.

7 THE COURT: Thank you.

8 THE COURT CLERK: All rise.

9 (Matter concluded)

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16
17 Pursuant to Section 753, Title 28, United States
18 Code, the following transcript is certified to be
19 an accurate record as taken stenographically in
20 the above entitled proceedings.

21
22
23 s/CHARLES P. McGUIRE, C.C.R.